IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 113 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KANAIYALAL ARJANDAS

Versus

TRIBHOVANDAS DEVSIBHAI PANDIT

Appearance:

MR PM RAVAL for Petitioner

MR HN JHALA for Respondent No. 1

Mr. S.R.Divetia,PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 08/05/97

ORAL JUDGEMENT

Kanaiyala Arjandas-original complainant in Criminal case No. 8219 of 1984 on the file of the Judicial Magistrate, First Class, Narol has preferred the present Revision Application against the order of the learned Additional Sessions Judge, Ahmedabad (Rural) at Narol passed on 17th September, 1985 in Criminal Appeal

No. 55 of 1985. Neither Revision Applicant nor the applicant's advocate is present, but as this Revision Application is admitted and as the record and proceedings is on record, I proceed to decide this Revision Application on merits after perusing the record and after hearing the learned Additional Public Prosecutor Mr. Divetia supporti ng the Revision Applicant.

2. The respondent no.1 was charge-sheeted by the police of Narol police station on the allegation that on 19.11.84, at about 12.45 p.m., he drove his truck no. GTC 2265 at Kubernagar, "G" ward near Radhaswami Auto centre in rash and negl igent manner and caused death of Kishorbhai, a boy aged about 15 years. The learned Magistrate at Narol had framed charge against the accused for the offence punishable under sections 304-A and 279 of the Indian Penal Code. The respondent no.1 accused had pleaded not guilty to the charge and his defence was a total denial.

3. In order to prove its case against the respondent no.1, the prosecution had examined number of witnesses. On considering the evidence before him, learned Judicial Magistrate came to the conclusion that the accusedwho was the driver of the said truck no. GTG 2265 at the time of the inciden had driven his truck in rash and negl igent manner and had caused death of Kishorbhai. He therefore, sentenced the respondent no. 1 under section 304-A of the Indian Penal Code to suffer RI for one year and to pay a fine of Rs.500/-, in default, to suffer RI for one year, but chose not to award any sentence under section 279 of the Indian Penal Code as swel l as under section 116 of the Motor Vehicles Act.

4. Feeling aggrieved by the said decision, the respondent no. 1 had preferred Criminal Appeal no. 55 of 1985 before the Sessions Court. The said appeal was heard by the learned Additional Sessions Judge. Learned Additional Sessions Judge came to the conclusion that from the material on record, the prosecution had failed to prove beyond reaso nable doubt that the accused was the driver of the said truck no. GTG 2265 at the time of the incident, though the prosecution has proved that the deceased Kishorbhai had met with death due to injuries sustained by him on account of passing over of the said truck no. GTG 2265. He therefore, gave the benefit of doubt to the present respondent no.1 and acquitted him of the offence with which he was charged by h is judgment dated 17th September, 1985. Being aggrieved by the said decision, the deceased's

brother-original complainant Kanaiyalal Arjandas has preferred the present Revision before this Court.

5. Learned Additional Sessions Judge has written an exhaustive and detailed judgment, the reasoning of which is running in 9 pages. He has taken into consideration the evidence of p.w. Kanaiyalal Arjandas, p.w. Rameshbhai, p.w. Babubhai Kanjibhai, p.w. Merna Mohanbhai, p.w. Dolatbhai, p.w. Mohanbhai Ghanshyambhai, p.w. Ramanbhai, p.w. Babubhai Manabhai, p.w. PSI Mali and after discussing the evidence of each of them, has come to the conclusion that the prosecution has failed to prove beyond reasonable doubt that the respondent no.1-original accused was driving the truck at the time of the incident. Out of those witnesses examined by the prosecution, p.w. Rameshbhai, p.w. Merna Mohanbhai, p.w. Mohanbhai Ghanshyambhai are the witnesses from the place of incident, but it is very pertinent to note that none of them has stated on oath that the respondent no.1 before this Court-original accused was driving the truck at the time of the incident. As a matter of fact, not a single witness has deposed before the trial court that the original accused-respondent no.1 before this Court was driving the truck at the time of incident. The accused has taken a positive defence that he was not driving the truck at the time of the incident. When such a positive defence was taken by the accused, it was necessary for the prosecution to prove by direct evidence that he was in fact, driving the truck at the time of incident in question. But no such evidence was produced by the prosecution.

6. Learned Judicial Magistrate had held guilty respondent no.1 before his Court on the basis of two circumstances (1) p.w. Babubhai Kanjibhai has deposed at exh. 16 that he was the owner of the truck in question GTG 2265 and the respondent no.1 employed on the said truck as the driver by him. But he has also clearly deposed that on 19.11.84, i.e. on the day of incident, he was out of Ahmedabad and he was also not in State as on that day, the accused was in charge of the said truck as a driver of the said truck. But merely because the accused was employed by him as a driver of the said truck, no conclusion could be drawn without any hesitation of mind thast the accused was actually driving the truck at the time of the incident in question. The learned Judicial Magistrate had said that when the respondent no.1 was employed as a driver of the truck, the burden of proof lies on him to prove that he was driving the truck at the time of the incident. It must

be remembered that it is a criminal trial and in the criminal trial, burden of proof is on the prosecution to prove that rash and negl igent act was committed by the person who is charge-sheeted by the prosecution and it is not for the said person to show or prove that he had not committed any rash and negligent act.

7. Another circumstance taken into consideration by the learned Magistrate in holding the respondent no.1 guilty was the evidence of p.w. Babubhai Manabhai, the police constable on duty at Kubernagar police chowky. Now, the said witness had deposed that the present appellant had come to the said chowky and had informed him about the accident in question and thereupon he had given intimation to Sardarnagar police stastion and then he had handed over the respondent no.1 to the police Sub Inspector Shri Mali. It is very pertinent to note that the evidence also does not show that the accused had given intimation to the said police constable Babubhai Manabhai that he was driving the truck at the time of the incident. Merely because he happened to give an intimation of the accident, it could not be said that he must be the driver of the truck. Even if he had given an intimation that he was driving the truck at the time of the accident in question to the said police constable. Said part of his information is hit by the provision of section 25 of the Evidence Act as it would amount to an inculpatry statement of an accused. Therefore, merely because he happened to give information of the accident, the conclusion arrived at by the learned Magistrate that he was the driver jof the said truck was not justified as has been held by the learned Additional Sessions Judge.

8. Therefore, as discussed above, learned Additional Sessions Judge has re-appreciated the oral evidence on record and has come to the conclusion that the prosecution had failed to prove beyond reasonable doubt that the original accused-respondent no.1 before this Court was actually the driver of the truck in question. Said conclusion of the learned Additional Sessions Judge could not be said to be either perverse or manifestly erroneous so as to interfere with the said finding while exercising revisional jurisdiction.

9. It must be also mentioned here that the present application is filed by the original complainant in a State case. The State has chosen rightly so not to prefer any Revision against the order of acquittal passed by the learned Additional Sessions Judge. The powers of the Court in REvision by a private complainant in a State case to interfere with the order of acquittal are very

restricted as has been held by the Apex Court in the case of Chinnaswami vs. State of Andhra Pradesh, reported in 1962 SC,1788. As per the said decision in such matters, if the High Court happened to come to the conclusion that the findings of the learned Additional Sessions Judge in allowing the appeal are perverse or manifestly erroneous, then to remand the matter to the trial court for a fresh trial and the High Court cannot straightaway convict the accused. But anyway, fro m the material on record, I am unable to hold that this is a fit case for exercising a revisional jurisdiction. I therefore, hold that the present Revision Application will have to be dismissed. Revision is dismissed. Rule is discharged.

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